Supreme Court, U.S.
FILED
JUN 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-1854

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

AMERICAN NATIONAL CAN CORPORATION, *et al.*,
Petitioners,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Washington

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BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as amicus curiae in support of the petitioners' petition for writ of certiorari in the above-captioned case. The consents of the counsel for petitioners and respondent have been obtained and will be filed with this Court.

INTEREST OF AMICUS CURIAE

The Council of State Chambers of Commerce (Council), organized in 1932, consists of 43 state chambers of commerce. The Committee on State Taxation (COST), one of three advisory committees of the Council, consists of 344 corporate members, including thirty-seven of the seventy-seven petitioners.

COST's objective is to preserve and promote equitable and non-discriminatory state taxation of corporations engaged in business enterprises in more than one state. COST member companies conduct a substantial portion of the interstate commerce of United States taxpayers. They are representative of that part of the Nation's business sector which is directly affected by state taxation of interstate operations. Therefore, COST is vitally interested in cases such as the instant case in which a discriminatory tax scheme places interstate corporate taxpayers at a competitive disadvantage solely because of their status as interstate, rather than intrastate, corporations.

SUMMARY OF ARGUMENT

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this Court made clear that whether a state tax will meet Commerce Clause requirements does not depend on formalisms, but on the practical economic effect of the tax on interstate commerce. This Court rejected the contention that constitutional significance should attach to semantic differences. *Id.* at 285. However, the State of Washington has attempted to revert to pre-*Complete Auto* law, under which state taxes were upheld if sophisticatedly drafted to appear to formally conform with the Commerce Clause.

This Court invalidated Washington's previous business and occupation tax in *Tyler Pipe Industries, Inc. v. Department of Revenue*, 483 U.S. 232 (1987) because the multiple activities exemption then in effect discriminated against interstate commerce. The tax scheme at issue in *Tyler Pipe* imposed a "selling" tax on both local and out-of-state manufacturers. However, local manufacturers were exempt from the State's "manufacturing" tax. Out-of-state manufacturers were not allowed that exemption.

At issue in this case is the business and occupation tax scheme enacted in response to *Tyler Pipe*. The drafters of this tax scheme repealed the multiple activities exemp-

tion struck down in *Tyler Pipe* and replaced it with a credit system. Under this system, local manufacturers are allowed a credit against their selling tax for their manufacturing tax paid to the State. Technically, the statute allows out-of-state manufacturers a credit against the Washington selling tax for the manufacturing tax paid to other states. However, the definition of a manufacturing tax has been so narrowly defined to effectively deny the credit to out-of-state manufacturers. Thus, through creative draftsmanship, local businesses continue to receive an exemption denied out-of-state businesses.

The fact pattern in this case is very similar to that in *McKesson Corporation v. Florida Alcohol and Tobacco Division*, —— U.S. —— (1990), involving the Florida tax scheme enacted in response to *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which held that a tax scheme virtually identical to Florida's was unconstitutional. Florida's revised tax scheme was found unconstitutional as it "reflected only cosmetic changes from the prior version of the tax scheme . . . invalidated in *Bacchus*", *McKesson, supra*, Slip Op. at 25, so that the practical economic effect of the revised tax, as in the case of the original tax scheme, was to favor local business over out-of-state business.

The practical economic effect of Washington's revised tax is that it favors local business over out-of-state business. Thus, under this Court's post-*Complete Auto* Commerce Clause analysis, the current tax scheme is no different from the tax struck down in *Tyler Pipe* and must also be held invalid. If the decision of the Washington Supreme Court is allowed to stand, the States will be encouraged to avoid Commerce Clause restrictions on their taxing power through clever use of legal terminology. In *McKesson*, the use of creative draftsmanship as a means of circumventing the Commerce Clause was rejected and its use must again be rejected in the instant case.

ARGUMENT

THE COMMERCE CLAUSE PROTECTIONS ARE INVOKED WHEN THE PRACTICAL EFFECT OF A STATE TAX RESULTS IN DISCRIMINATION

It has long been established doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and that its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce be free from any direct restrictions or impositions by the States. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). Thus, while States may tax interstate commerce, they are prevented from imposing a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business or by subjecting interstate commerce to the burden of multiple taxation. *Id.* The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977). These are long acknowledged Commerce Clause principles. However, the application of these principles by this Court has developed from one based on formalisms to one based on practical economic effect. When the practical economic effect of Washington's Business and Occupation (B&O) Tax is examined, it is clear that the tax violates these principles.

In the 19th century, this Court established the doctrine that the Commerce Clause limits state power over interstate commerce, holding that "no state can impose a tax upon freight transported from state to state." *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 281, 282 (1873). Contemporaneously, the Court permitted a tax on the gross receipts of a railroad company, but acknowledged that the line between a tax on the transportation and a tax on the income from the transportation is one that "is sometimes difficult to define with distinctness."

State Tax on Railway Gross Receipts, 82 U.S. (15 Wall.) 284, 296 (1873). Thus, in these two cases, two taxes that have a substantially similar impact on interstate commerce are accorded different constitutional treatment because of a fine line distinction between a "direct" and "indirect" tax. Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 ABA Tax Lawyer 37 (1987).

For the next century, states, taxpayers and this Court struggled with this formalistic approach. This Court itself acknowledged that after some 300 decisions decided in the course of a century it had created a "quagmire" and that there was a need for clearing up "the tangled underbrush of past cases." *Northwestern States Portland Cement*, at 485. However, in *Northwestern*, this Court upheld a tax which was virtually identical in every respect to a tax it had invalidated in *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), because "the formal subject of the tax in *Northwestern* was the corporation's net income, whereas in *Spector* it was the privilege of doing business." Hellerstein, *supra*, at 55. Thus, the rule of formalism continued. This is made eminently clear in *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975), in which the Louisiana franchise tax, previously held unconstitutional by a State court, was upheld because the statute no longer imposed the tax on "the privilege of carrying on or doing business", but imposed it on "the qualification on or do business in this state . . . in the corporate form."

Under the above cases, it was apparent that "with a minimum of wordsmithing, the legislature was able to deprive the taxpayer of its constitutional immunity." Hellerstein, *supra*, at 55. However, in 1977 this Court squarely faced the problems it had created with its formalistic reliance on wordsmithing in state tax statutes in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). This Court recognized that "the Spector rule, as

it has come to be known, has no relationship to economic realities. Rather it stands only as a trap for the unwary draftsman." *Complete Auto Transit*, at 279. Thus, this Court explicitly rejected the Spector rule since it "deems irrelevant any consideration of the practical effect of the tax", *id.* at 278, and "there is no economic consequence that follows necessarily from the use of the particular words . . . and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." *Id.* at 288.

In overruling *Spector*, this Court observed that the retention of the formalistic view had the effect of "narrowing the rule to one of draftsmanship and phraseology." *Id.* at 281. This Court then enunciated the four requirements which now constitute the Commerce Clause test for state taxes: 1) the tax must have a substantial nexus with the state; 2) the tax must be fairly apportioned to the activities carried on by the taxpayer in the state; 3) the tax must be nondiscriminatory; and 4) the tax must be fairly related to the services provided by the state. Under this four part test, which has consistently been applied by this Court, the validity of a tax depends on its practical economic effect.[1]

When the practical economic effect of the current Washington B&O tax credit scheme is examined, it is clear that the tax differs from that in *Tyler Pipe* only in "draftsmanship and phraseology". As in *Tyler Pipe*, this tax scheme must be found to violate the Commerce

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[1] State taxes were found to violate the third, nondiscrimination requirement in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *Tyler Pipe Indus. v. Washington Dept. of Revenue*, 483 U.S. 232 (1987); *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987); *New Energy Co. v. Limbach*, 108 S.Ct. 1803 (1988).

Clause.[2] Therefore, it is important that this Court accept this case for review in order that the States clearly understand that the Commerce Clause cannot be circumvented through the use of draftsmanship and phraseology and that this Court has not retreated from its landmark decision in *Complete Auto.*

CONCLUSION

For the foregoing reasons, the Committee on State Taxation respectfully requests that the Petitioners' Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Dated: June 22, 1990

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[2] Petitioners have demonstrated that the practical economic effect of the current credit scheme is no different than that struck down in *Tyler Pipe.* Insofar as that argument has been fully developed in Petitioners' Petition for Writ of Certiorari, COST will not present any argument on this issue. However, COST is in full accord with the argument as presented by Petitioners.

as required by *New Energy* presents an important federal question. For the foregoing reasons, Petitioners respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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